PD-0867-18
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
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DEANA WILLIAMSON
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No. PD-0867-18

Troy Allen Timmins
Appellant

v.

The State of Texas
Appellee

IN THE COURT OF CRIMINAL APPEALS OF TEXAS, AT AUSTIN

FILED
COURT OF CRIMINAL APPEALS
3/27/2019
DEANA WILLIAMSON, CLERK

State's Response to Appellant's Reply Brief

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

COME NOW, Scott F. Monroe and David A. Schulman, attorneys of record for the State of Texas, and respectfully file this response to the reply brief filed by Appellant on March 18, 2019, and would respectfully show the Court as follows:

I

In his reply brief, Appellant restates many of the complaints he has previously raised and which have already been addressed. Appellant also attempts, for the first time, to insert an issue and argument that were not raised below, and, thus, were not addressed by the opinion of the Court of Appeals in this case.

For the first time in his reply brief, Appellant attempts to raise a new issue of jury charge error (see Appellant's reply brief at 17). Raising a new claim at this juncture is entirely improper and procedurally waived.

Rules 66.3 and 68.1, Tex.R.App.Pro., provide that the Court of Criminal Appeals may grant discretionary review to review a decision of a Court of Appeals. In this case, jury charge error was never presented to the Court of Appeals, so there is nothing for this Court to review. The Court of Criminal Appeals will not ordinarily review issues that the Court of Appeals has not reached. See, e.g., ***Gilley v. State***, 418 S.W.3d 114, 119 (Tex.Cr.App. 2014); ***Davison v. State***, 405 S.W.3d 682, 691-692 (Tex.Cr.App. 2013); ***Benavidez v. State***, 323 S.W.3d 179, 183 (FN 20)(Tex.Cr.App. 2010); ***Zuliani v. State***, 353 S.W.3d 872 (Tex.Cr.App. 2011).

In his reply, Appellant seems to more narrowly tailor his complaint toward his "appear" argument, rather than reiterate his "release" argument. The State's surreply, therefore, will focus on that as well.

II

Appellant commences his reply with citations to "secondary sources." Upon review of his assertions, the quotes from those sources seem to be more

akin to "sound bites."[1] In other words, he is using isolated statements taken out of context. The sources cited by Appellant do not speak directly to the issue before the Court, are somewhat dated, and are not controlling authority.

The sources cited by Appellant do not directly support his claim that "appear" has been technically transmogrified into "appear in court." By way of analogy, Article 24.01, C.Cr.P., the Texas subpoena statute, uses the word "appear," and requires the presence of someone, somewhere, at a particular time. The subpoena statute provides:

> Art. 24.01. ISSUANCE OF SUBPOENAS. (a) A subpoena may summon one or more persons to appear:
>
> (1) before a court to testify in a criminal action at a specified term of the court or on a specified day; or
>
> (2) on a specified day:
>
> (A) before an examining court;
>
> (B) at a coroner's inquest;
>
> (C) before a grand jury;
>
> (D) at a habeas corpus hearing; or

[1] "A short sentence or phrase that is easy to remember, often included in a speech made by a politician and repeated in newspapers and on television and radio." See Cambridge Dictionary On-Line; © Cambridge University Press 2019. "A short statement that is remarkable in some way, typically one that has been recorded, often excerpted from a longer speech, interview, press conference, etc., especially as used during a news report or something similar." See Farlex Dictionary of Idioms; © 2015 Farlex, Inc, all rights reserved. "A short comment by a politician or other famous person that is taken from a longer conversation or speech and broadcast alone because it is very interesting or effective." See McMillan Dictionary On-Line; © Springer Nature Limited 2009-2019.

> (E) in any other proceeding in which the person's testimony may be required in accordance with this code.

Under this analogous statute, an appearance pursuant to a subpoena does not always mean to "appear in court."[2] Moreover, Article 39.02, C.Cr.P., provides that depositions may be taken by either the State or the defendant. As depositions are typically taken in an attorney's office conference room in an informal setting without a judge, subpoenas issued to "appear" for a deposition do not necessarily require one to "appear at court." To require all instances of the word "appear" to mean "appear at court" would completely vitiate the subpoena process for depositions.

Appellant also faults the State for only referencing section 311.011 of the Code Construction Act one time in a footnote in the State's brief. The State responds that the entirety of it's three page discussion under the heading "III. Statutory Construction" deals with this subject (see State's brief at 7-10).

Since the claim fails under Gov't Code § 311.011(a), the plain meaning aspect of the Code Construction Act, which states that "words and phrases shall be read in context and construed according to the rules of grammar and common

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[2] See., e.g., Art. 24.01 (a)(2)(B)(coroner's inquest), (a)(2)(E) (in any other proceeding in which the person's testimony may be required in accordance with this code).

usage," further analysis is unnecessary. The is no need to contort the English language to reach a strained "technical" definition under 311.011(b) of the Government Code. Appellant's assertion that "appear" and "release" "are always given their technical meaning" (see Appellant's reply brief at 15) ignores an appearance at a deposition pursuant to a subpoena, or for that matter, "to appear in accordance with the terms of his release" under Penal Code section 38.10(a), the bail jumping and failure to appear statute.

III

Appellant next rehashes his analysis of ***In re B.P.C.***, No. 03-03-00057-CV (Tex. App. - Austin May 27, 2014), that has been adequately briefed, and was correctly considered by the Court of Appeals in this case. Appellant presents nothing new, and ***B.P.C.*** remains distinguishable by offense and factual basis as the State has previously discussed (see State's opening brief at 6-7).

IV

Finally, the Appellant accuses the State of misstating facts in the record (see Appellant's reply brief at 20). He claims the State misrepresented that Appellant was going to take his mother home before returning to remand for custody. He then cites to Vol. 6, P. 125-126, of the Reporter's Record. What the

State cited in its brief is exactly what is set out at Vol. 6, P. 126, L. 2-6, of the Reporter's Record. It is, in fact, Appellant who has, in his reply, misstated the record. Accordingly, this assertion of misrepresentation should be completely discounted and disregarded.

Appellant also claims advertent misrepresentation in the statement contained in the conclusion portion of the State's brief that Appellant was "freely driving" down the highway. Driving down the freeway, however, can refer to all occupants of a car in motion, not necessarily just the actual operator. Perhaps a better word choice would have been freely riding, or even traveling, down the highway, but the word choice of the State's scriber certainly does not amount to misrepresentation.

Conclusion

Appellant has not raised anything new in his reply brief that merits a different outcome. This Court should affirm the judgment and conviction of the court below.

Prayer

WHEREFORE, PREMISES CONSIDERED, Counsel for the State respectfully prays that respectfully prays that this Honorable Court, upon submission, will affirm the judgment and conviction of the court below.

Respectfully Submitted,

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Of Counsel on the Brief

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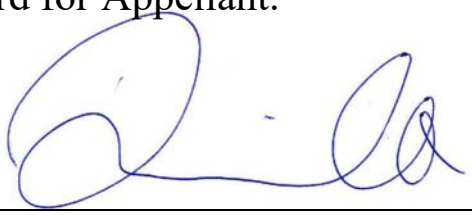
Certificate of Compliance and Delivery

This is to certify that: (1) this document, created using WordPerfect™ X9 software, contains 1,213 words, excluding those items permitted by Rule 9.4 (i)(2)(B), Tex.R.App.Pro., and complies with Rules 9.4 (i)(2)(B) and 9.4 (i)(3), Tex.R.App.Pro; and (2) on March 27, 2019, a true and correct copy of the above and foregoing surreply was transmitted via the eService function on the State's eFiling portal to Patrick Maguire (mpmlaw@ktc.com), and Ryan Kellus Turner (rkellus@gmail.com), counsel of record for Appellant.



David A. Schulman